

grand scale in Asia." At other times, his perspective could be frightfully naive. He described Sukarno of Indonesia as "a great democratic leader," and Ngo Dinh Diem of South Vietnam as one who represented "the parliamentary tradition where free speech and free press are permitted, where opposing views are tolerated and even encouraged, where differences of opinion shape the course of events, where there is no dictator, where men debate and air their differences and then settle on a compromise solution."

Although he never left his ROTC unit in Walla Walla during World War I, Douglas qualified for burial in Arlington National Cemetery and was interred there in 1980 near Warren, Black, and Oliver Wendell Holmes. Although it is doubtful that Douglas knew Woody Guthrie "from my hobo days," as he later claimed, he insisted that "This Land is Your Land, This Land is My Land" be sung at his funeral. "It reflects not a socialist dream," he noted, "but . . . the right to move from place to place to look for a job or establish a new home, the right to move interstate without payment of a fee. . . . In other words, it expresses the vagrancy issue as I have expressed it and as it has become ingrained in the law." To the very end, he remained the Huck Finn of our judicial tradition, sharply critical of American society, but ultimately uncommitted, irresponsible, and self-indulgent, always anxious to escape Aunt Polly's grasp by fleeing into the wilderness.

AMERICAN BROADCASTING AND THE FIRST AMENDMENT. By Lucas A. Powe, Jr.¹ Berkeley, Ca.: University of California Press. 1987. Pp. x, 295. \$25.00.

CABLE TELEVISION AND THE FIRST AMENDMENT. By Patrick Parsons.² Lexington, Ma.: Lexington Books. 1987. Pp. iv, 168. \$24.00.

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As their titles indicate, these two books are both about broad-

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casting and the first amendment. They contain, in my opinion, able arguments for bad solutions to the problems of that difficult subject.

I

It is axiomatic that licensing of the press is an unconstitutional prior restraint which offends our deeply held notions of how a free press should function. We cannot tolerate such censorship because, as the Supreme Court told us over fifty years ago, our complex modern society has a "primary need of a vigilant and courageous press."⁴ Professor Lucas Powe, in *American Broadcasting and the First Amendment*, argues that the licensing of broadcasting is likewise improper, because it inevitably leads to censorship, as well as bureaucratic inconsistency and political partisanship. By chronicling the history of abuses at the FCC under the current "public trustee" system of licensing, Professor Powe seeks to persuade us that with *any* system of licensing, the licensor will "condemn to silence that which it fears, hates, or cannot understand."

Powe begins by disputing the traditional thesis that broadcast regulation can be justified by reference to the differences between broadcasting and the print media. Historically, broadcasting has never been accorded the full range of first amendment privileges that the print media enjoys. Thus, at the same time that the Supreme Court held that even the threat of newspaper censorship was impermissible,⁵ the federal courts were upholding the FCC's authority to scrutinize program content in order to make public interest determinations.⁶ Yet broadcasting is clearly a part of the press, writes Powe, and we should therefore heed the lesson of centuries of English experience: that the inevitable by-product of licensing is abuse.

Powe traces the judicial distinction between print and broadcasting back to early decisions which found that motion pictures and other forms of "entertainment" were not entitled to first amendment protection. According to Powe, the whole public trusteeship concept, including the notion of spectrum scarcity, was really a makeshift justification which was designed to obfuscate the original erroneous assumption that broadcasting is not fully protected by the first amendment because it is so different from print. Seminal cases such as *NBC v. U.S.* and *Red Lion Broadcasting v. FCC* mistakenly failed to recognize that the first amendment is violated by requiring *any* license to use the radio spectrum—that any

4. *Near v. Minnesota*, 283 U.S. 697, 720 (1931).

5. *Id.* at 722-23.

6. *Trinity Methodist Church v. FCC*, 62 F.2d 850 (D.C. Cir. 1932).

justification for licensing necessarily misses the mark. Rather than embodying a critical look at broadcast regulation, *Red Lion* is best seen as the all-too-human response of Justices raised in an era when radio was a novelty, who felt compelled to construct new legal theories to deal with it.

The book then describes a parade of horrors under FCC regulation of broadcasting. Franklin Roosevelt attempted to retaliate against his newspaper critics by preventing them from owning radio licenses as well. Nixon assaulted the networks and sought to undermine public broadcasting. While these attempts were not as successful as the politicians had hoped, Powe notes that the Eisenhower administration made partisan political appointments to the Commission. Those partisan commissioners “stood as temporary custodians to a huge pot of gold, and it was their decision who would get their hands into it.” Powe believes that the standards the FCC used to determine whether grants of broadcast licenses would be in the public interest were applied unevenly at best, and at worst were based solely on politics and were therefore “scandalous.” Such partisanship is a natural result of the fact that the majority of commissioners are from the incumbent political party, since “licensing will always be used to further impermissible agendas.”

Powe argues that the FCC, by virtue of the fact that it wields the ultimate threat—nonrenewal of the license—has seriously chilled broadcasters. He points out that, in major cases, broadcasters were punished for failing to serve the “public interest” and thus the threat is credible, especially in light of the almost constant approval of FCC decisions by the D.C. Circuit.

It is this supervision of broadcast licensees by the FCC which Powe views as one of the basic evils of the public trustee licensing scheme. The fairness doctrine, instead of being designed to ensure diversity and balance, is a mechanism by which the FCC can muzzle broadcasters with unpopular opinions. For Powe, *Red Lion* exemplifies such a use. The Democratic party used the doctrine to gain over 1700 hours of free air time and to inhibit right-wing broadcasters. All this was due to an attack by the Reverend Billy James Hargis that was simply a rebuttal to an article by Fred Cook in *The Nation*. Thus, the fairness doctrine is fundamentally unfair. Worse, it chills speech simply by looming as a threat. Quoting President Nixon’s head of the Office of Telecommunications Policy, T. Clay Whitehead, Powe agrees that “[t]he value of the sword of Damocles is that it hangs, not falls.”

In a chapter on “Maintaining Cultural Morality,” Powe reviews the history of the FCC’s treatment of offensive language in-

cluding sexual references, drug lyrics, and four letter words. He notes that the FCC initially used the circuitous "inadequate supervision" rationale (licensee failed to supervise station operation) to suppress offensive content rather than directly and candidly censoring indecent language. The result, however, was the same: the FCC punished stations for airing unconventional programming which was offensive to white, middle-class values. Later, of course, the FCC did embrace the indecency theory, adding nuances of its own in *FCC v. Pacifica*. As it stands, the Commission has legal authority to prohibit the use of offensive language in order to protect children. In addition, there is the notion that such regulation is justified because broadcast stations are pervasive intruders into the home. Professor Powe insists that such government action is inappropriate and unlawful in a diverse and free society.

Powe contends that public ownership is not a sufficient reason for licensing and that the scarcity theory is both ill-fitting and elusive. For example, responding to Justice Frankfurter's opinion in *NBC* stating that licensing is necessary to prevent confusion and chaos in the airwaves, Powe asserts:

It is true that if everyone broadcasts, no one can be heard. But it is also true that if everyone at a park speaks at the same time, no one can hear and, equally, that if you write your message on a piece of paper and I write mine over it, no one can read your message.

His point is that technological scarcity does not truly exist; what we lack is a system of property rights. And to create such rights, we do not require an FCC.

Powe also rejects every other form of the scarcity argument. Conceding that the spectrum is inherently limited, he notes that so are all resources. In any event, technological advances will address this problem. True, the number who want to broadcast exceeds the number of frequencies, but this is because the licenses are free. Likewise, although not everyone who wishes to broadcast is able to do so, as a practical economic matter this is also true of newspapers. Finally, responding to the notion that broadcast stations are scarce relative to printed media, Powe argues that not only is the number of broadcast outlets increasing while the number of daily newspapers is declining, but a proper comparison would include CB radios and the like as "broadcast outlets." What is behind these pro-regulation theories, urges Powe, is a basic and irrational fear of the broadcast medium; the evidence is *Pacifica*.

To those who are conversant with the literature, Professor Powe's points will sound familiar. The great strength of Powe's

book is its cogent marshalling of the evidence to support his thesis. Clearly and directly written, it is a pleasure to read.

Nevertheless I believe that the work is too one-sided. Powe is right that the FCC has committed several first amendment blunders. But it has also stressed that it cannot censor the most distasteful material (e.g., anti-Semitic matter);⁷ that it encourages robust, wide-open presentations;⁸ that there should be great discretion vested in the broadcast licensee and thus very high barriers before any fairness complaint will even be referred to a broadcaster;⁹ that it will not investigate charges of news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion;¹⁰ and so on. The Court of Appeals for the District of Columbia Circuit, which Powe regards as a "patsy" for the FCC, has stressed that the Commission is not to intervene in broadcast journalism except in the most flagrant cases.¹¹

I don't recognize the FCC portrayed by Powe: active, eager to insure that licensees conform to its view of the public interest, ready to pounce on the errant broadcaster. The FCC that I have known intimately since the 1940s is inept, reluctant to act in the public interest, and a captive of the industry it regulates. Powe lists the WLBT-TV case as supporting his position. But the FCC twice renewed this racist broadcaster who would only present the segregationist point of view, white churches but no black ones, white colleges but never a black one, and so on; it was the Court which ruled that such a broadcaster simply could not be renewed as a public trustee.¹² Powe cites the FCC's *WHDH* decision¹³ as another chilling action. But *WHDH* was not a regular renewal; the FCC regarded the case as a new comparative hearing because of the improper *ex parte* presentations that had been made by *WHDH*. Powe should have acknowledged that the FCC's record in the comparative renewal field is shamefully passive: the incumbent always

7. *Anti-Defamation League v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

8. *E.g.*, *Pacifica Foundation*, 36 F.C.C. 147 (1964).

9. *Fairness Report*, 48 F.C.C.2d 1, 17-21 (1974).

10. *Id.* at 21.

11. *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976); *NBC v. FCC (Pensions)*, 516 F.2d 1101, 1155, 1156, 1180 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). *See also* *CBS v. Democratic Natl. Comm.*, 412 U.S. 94 (1973).

12. *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965), *rev'd and remanded*, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); 425 F.2d 543 (D.C. Cir. 1969).

13. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd*, *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 1007 (1971).

wins, no matter how poor its performance has been.¹⁴ The Commission has never met a comparative renewal applicant that it did not eventually favor.

The picture is no better in regular renewals: broken promises don't matter;¹⁵ licenses can be granted with 0/0 in news/public affairs;¹⁶ a licensee on short-term renewal can commit the same kind of fraud on advertisers and still gain another renewal.¹⁷ This is a sorry record. Powe soundly notes the seminal work of the economist Ronald Coase; he should have heeded Coase's estimate of the FCC regulatory process: a fake wrestling match, full of grunts and groans, signifying nothing.

Even in his treatment of theory, Powe is too one-sided. As he notes, government licensing stemmed from the engineering chaos of the 1920s. Since more people wanted to broadcast than there were available frequencies, the government had to choose one and keep all others from interfering with that authorization. Powe is correct that the government could have simply auctioned the frequency (for an indefinite or a suitably long term). But he does not recognize that there were strong reasons for rejecting this alternative and adopting a licensing scheme.

The government wanted communities to have their own local broadcast outlets, so it allocated valuable frequencies on this basis. Further, it wanted broadcasting to contribute to an informed electorate, so important to the proper functioning of a republic; thus again it bestowed an inordinate amount of the scarce radio spectrum to broadcasting compared to the many other claimants. If it is reasonable to allocate the spectrum on these bases, it follows that the licensing scheme should operate so as to advance those same goals: licenses go to those who volunteer to serve the public interest by being effective local outlets presenting a reasonable amount of informational programming geared to their communities. The scheme was one of government licensing of essentially private broadcasting with wide discretion but reasonably tempered to serve the needs of the community and the nation.

Powe is right that any such scheme is bound to create first amendment strains. But the FCC could have adopted objective standards directed to the bedrock allocations scheme (e.g., 15% lo-

14. See, e.g., *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982); *Moline Television Corp.*, 31 F.C.C.2d 263 (1971).

15. See *KORD, Inc.*, 31 F.C.C. 85 (1961) and *Moline Television Corp.*, *supra* note 14.

16. See, e.g., *Herman Hall*, 11 F.C.C.2d 344 (1968); Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Policy: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968).

17. *Star Stations of Indiana, Inc.*, 19 F.C.C.2d 991 (1969).

cal and 20% informational programming, the latter defined broadly and also including the local category, in the hours 6:00 a.m. to midnight). This would have left the choice of programming to meet the guidelines to the discretion of the broadcaster, with the FCC having to intervene only in the most egregious cases such as *WLBT-TV*. The FCC could have applied the fairness doctrine only at renewal, and with a *New York Times v. Sullivan* standard of bad faith or reckless disregard; this would have allowed the Commission to focus on the essential goal—the public fiduciary concept—rather than trying to insure fairness on every issue, a deep intrusion into daily broadcast journalism.

In fact, however, the FCC is wholly ineffective. It does not receive any programming information; it gets only a postcard at renewal and depends solely on the public to bring to its attention programming complaints. This is a joke: the public is busy with its own problems; it is not interested in checking up on the performance of the many broadcast stations. Starting with the Ferris Commission in 1980 and continuing today, the FCC, with the approval of the Court of Appeals, has simply given up.

Powe wants reform because of first amendment concerns. I believe that the FCC's ineffectual record, for over fifty years, is a stronger reason for drastic change. We should adopt a system of auctions (giving licensees who have recently engaged in a "private auction" some sufficient grace period) or at least reasonable spectrum usage fees (e.g., a percentage of gross revenues). The proceeds could be used to fund public broadcasting. This would give us a structure that works for the achievement of public interest goals. And we would have removed the sources of the first amendment problems in commercial broadcasting.

I and others have long advocated such an approach, and there was significant congressional interest in such reforms during the early 1980s. But the broadcasters, and the National Association of Broadcasters in particular, strongly oppose it. They like being called "public trustees." No one then calls for auctions or annual spectrum usage fees; what's more, they can seek carriage on cable systems as local public trustees. They gain all this with no really enforceable public fiduciary obligations.

Broadcasters have sufficient clout to prevent passage of any such deregulatory/auction/spectrum usage scheme. Ironically, the sole hope for progress lies in the present attack by broadcasters on the fairness doctrine. The FCC has cooperated by eliminating the

doctrine, and the matter is now before the Court.¹⁸ There is, however, no such thing as a surgical strike on the fairness doctrine. If—and it is a big “if”—the broadcasters win on their arguments that there is no scarcity or that broadcast regulation has chilling effects, the public trustee concept will fall. Then the question will arise: why is the broadcaster being kept on the frequency (and all others enjoined by the government) if he is not required to operate as a public fiduciary? Why not an auction or usage fee?

More likely, however, we will drift with the present ineffectual system for the rest of the century. Eventually, technology will rescue us. The fiber optic into the home, with its enormous capacity, or digital radio will bring us such abundance that there will be no need for any content-based approach. We will have video publishing over common carrier facilities, and the print model will govern. Whether Powe or I will live to see that first amendment nirvana is a different question.

II

Professor Patrick Parsons's *Cable Television* deals with an important and topical issue: the status of cable television under the first amendment. It takes its place beside another excellent work, *CableSpeech*, by George Shapiro, Philip Kurland, and James Mercurio.

After almost four decades of operation, cable television's status under the first amendment remains unsettled. The Supreme Court ducked the issue in the *Preferred Communications* case,¹⁹ stating that it needed a more thoroughly developed record. *Preferred* and several other cases are now making their way through the lower courts, and the Court will have its opportunity on a full record sometime before the end of the decade.

Cable television is playing an ever larger role in the electronic mass media. Today slightly over half of our television households receive television through cable, and the proportion is rising. The satellite has made feasible cheap, efficient distribution to the nation's over 7000 cable systems, spawning scores of cable programming services in addition to the traditional carriage of broadcast signals and fostering cable penetration of the larger markets. This

18. Syracuse Peace Council, 99 F.C.C.2d 1389 (1984), *recon. denied*, 59 R.R.2d 179 (1985), *remanded sub nom.*, Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), *vacated sub nom.* Syracuse Peace Council v. WTVH, 2 F.C.C. Rcd. 5043 (1987), *recon. denied*, F.C.C. 88-130 (April 17, 1988), *appeal pending*, Syracuse Peace Council v. FCC, Case No. 87-1566 (D.C. Cir.)

19. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

\$12 billion industry, with its winning mixture of pay, advertiser-based, and hybrid programming, has a bright future.

The choice of a regulatory scheme for cable thus has great significance for the nation. And the proper scheme can only be delineated on the basis of a sound analysis of cable's first amendment status.

Professor Parsons succinctly sets out the pertinent background, tracing the regulatory and judicial developments affecting cable's first amendment position. This discussion will be helpful, particularly to students seeking a lucid summary of this complex history.

Parsons also provides background on first amendment theory. He favors an "equitable protection" model—one that "strives for the greatest amount of protection and the least amount of interference with the rights of the individual and the rights of the collective." He finds that none of the various models of first amendment rights—broadcast, print, public forum, and public utility—meets the requirements of the equitable protection model when applied to cable. The broadcast model, with its close governmental supervision of overall programming efforts, fairness, and equal time requirements, does not strike a proper balance between the rights of the collective and the individual, since it "fails to provide sufficient protection to the individual from potential state interference in free speech rights." The print model, on the other hand, tilts against the collective, because cable appears to be a natural economic monopoly, with one entity thus controlling the flow of ideas over the scores of cable TV channels.

Parsons also finds fault with the application of the public forum and public utility models. The public forum model, in providing access as a constitutional right, could strike the proper balance, but judicial precedent is lacking to support its extension to cable. The same practical defect applies to the common carrier (public utility) model, which also "tends to overbalance in favor of the collective," leaving too much room for government control. Professor Parsons's solution is to carve out a new constitutional right over cable for specific messages or programs. He would do so first by limiting *Miami Herald v. Tornillo* to the print medium on the ground that, though a newspaper may be an economic monopoly, those who dislike its views can express themselves elsewhere in the same medium (for example, pamphlets and handouts). Cable, on the other hand, is a natural economic monopoly and therefore the courts should fashion a constitutional right of access to cable while protecting the operator from most other governmental regulation.

As with the entire book, the argument is clearly and cogently advanced. Its purpose is admirable, but in my opinion it is dead wrong. First, I realize that first amendment abuses can come with cable franchising and related regulations. From a first amendment viewpoint, life is much simpler if the judiciary preempts the area on constitutional grounds and narrows its own focus to one aspect, access. But throughout the book, Parsons has emphasized the practical—what is feasible under the law. And the practical here surely encompasses the Cable Communications Policy Act of 1984.²⁰ It controls this area unless it is unconstitutional.

The 1984 Cable Act authorizes the franchising entity to require access channels (the so called PEG channels—public, educational, and governmental access), over which the cable operator is not to exercise content control. The operator must fulfill franchise provisions for services, facilities or equipment supporting these PEG channels. And the Act requires cable systems with 36-54 channel capacity to set aside 10% of the channels for leased commercial access (i.e., on a common carrier basis), and those with 55 or more, 15% of channel capacity.

In my view, these provisions are constitutional. Parsons believes that there can be no valid basis for the franchise process. But common sense dictates that no person can dig up the streets or erect poles along the streets without a permit (franchise). The number of persons who can be allowed to do so for cable television operation is limited by technical considerations, but there is no need to explore that issue. I agree with Parsons that in actual operation cable turns out to be a natural monopoly. The government is thus bestowing a mass media permit that ends in monopoly operation, with one entity controlling the content of 75 or more TV channels into the home. In these circumstances, the government clearly has a legitimate interest in promoting the diversification principle underlying the first amendment.²¹ That is the purpose of the access provisions of the Act.²²

This statutory scheme meets the test of *United States v. O'Brien*. There is a substantial, indeed a compelling, justification for governmental intervention, and that intervention is narrowly tailored to accomplish the goal. The leased access requirement is limited to the larger system, and leaves 85-90% of the channel capacity to the full discretion of the cable operator. Further, the cable operator can use the access channels for its own purposes if there is

20. 47 U.S.C. §§ 521-59 (Supp. III 1985).

21. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

22. See H.R. REP. NO. 98-934, 98th Cong., 2d Sess., 30-36 (1984).

too little demand for access use. Significantly, access rules are not content-related regulation such as exists in the broadcast field: there is no review here of overall public service programming; indeed, the Act proscribes such content regulation. Thus, while the print model (*Tornillo*) is not followed, neither is the broadcast model (*Red Lion*). Rather, a different model has been carved out to meet cable's unique characteristics, as the concurring opinion in *Preferred* indicated might be a proper course.

Professor Parsons has particular difficulty in arguing that this legislative approach is unconstitutional, in light of his belief that there is a constitutional right to access in cable. Assuming that is so, the legislature can clearly act to implement that right, as it has done in similar areas (e.g., voting rights legislation to carry out the fourteenth amendment).

In this field, legislative solutions are more effective and appropriate. If the matter is left to the judiciary, it can act only when it finds a constitutional infirmity and its remedy is limited to the specific case. Congress on the other hand, can devise broader policies, and can revise through the regulatory agency. It can provide critically important financial support for the PEG channels through use of the 5% franchise fee permitted under the Act.²³ Without such support, the mere provision of the channel capacity can be ineffectual.

In short, I believe that it is preferable to allow the legislature to act and to have the courts review such action for constitutionality, rather than for the courts to proscribe all legislative action and themselves create a narrow constitutional right of access—a most dubious process. With such review, the courts can invalidate improper legislative restraints on the cable operator's first amendment rights. This traditional approach certainly has its problems and messes. But it is the most democratic and flexible one, and it assigns to Congress its proper role as an architect of policy and to the judiciary its role as a check on unconstitutional action.

Professor Parsons is thus right in his focus on the critical problem—cable as a monopolist controlling many TV channels into the home—and right in his solution—access. But I think his recommended method for creating access rights is seriously flawed.

23. I do not mean to extoll the 1984 Act as a paragon of sound policy. It is seriously flawed with respect to the use of the 5% franchise fee. See generally Geller, Ciamporcerro & Lampert, *The Cable Franchise Fee and the First Amendment*, 39 FED. COMMUNICATIONS L.J. 1 (1987).